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Friday, July 10, 1987

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re.

RONALD SIDEBOTTOM,

No. 1-87-00146

[Debtor](#) ⁱ.

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ORDER DENYING MOTION TO DISMISS

Facts

Debtor Ronald Sidebottom filed a [Chapter 13](#) ⁱ petition in February, 1984; his [plan](#) ⁱ was confirmed on September 10, 1984. In April, 1984, the debtor's spouse, Roxie Sidebottom, filed a motion for relief from the [automatic stay](#) ⁱ seeking leave to pursue a state court action against the debtor due to his alleged breach of his property settlement agreement with Roxie. On May 5, 1984, the court granted her relief for the limited purpose of making a motion for support in state court. Roxie filed an [adversary proceeding](#) ⁱ in this court to obtain the rest of the relief she sought. On July 31, 1986, Roxie brought a second motion for relief from the stay, seeking to enforce the support order she had obtained. An order granting this motion was entered pursuant to stipulation on August 14, 1986. On December 5, 1986, Roxie and the debtor obtained an order approving their settlement of the adversary proceeding. The settlement required the debtor to pay \$120,000.00 to Roxie and granted Roxie relief from the automatic stay to enforce her stipulation if the agreed payments were not made. On January 12, 1987, Roxie sought and obtained a writ of execution from the bankruptcy court. The debtor voluntarily dismissed his Chapter 13 proceedings on January 26, 1987, and filed the petition commencing this [Chapter 7](#) ⁱ case

the next day. Roxie now seeks to dismiss this case on the ground that the debtor was ineligible to file it pursuant to section 109(g)(2) of the [Bankruptcy Code](#).

Law

Section 109(g)(2) provides, in pertinent part, that no individual may be a debtor if within the previous 180 days he "requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay...." Since the automatic stay was modified to allow for enforcement of the settlement as a part of the settlement, and not pursuant to a request, resolution of this issue depends on the effect of the two earlier motions for relief from the stay filed by Roxie. The two motions for relief filed by Roxie had been fully resolved long before the case was dismissed and this Chapter 7 filed. The issue becomes whether the word "following" in the statute means "at any time after" or "closely on the heels of." For the reasons set forth below, the court adopts the latter interpretation.

The best statement of the interpretation to be given to section 109(g)(2) is found at 5 [Collier on Bankruptcy](#), p.1307-4, n.84a:

This portion of 109(g) was intended to prevent debtors from frustrating creditors by voluntarily dismissing their cases and filing new cases before a motion for relief from the stay could be heard, or soon after it had been granted. As such, it should not be read literally to bar a debtor from refiling where this purpose would clearly not be served. For example, if a debtor voluntarily dismisses a case after a request for relief from the section 362 stay has been denied, it is clear that the request for relief did not trigger the dismissal. Similarly,

when the voluntary dismissal was remote in time from the request for relief, ... the voluntary dismissal should not be considered one "following the filing of a request for relief" in the sense intended by 11 U.S.C. sec. 109(g).

See also [Matter of Patton](#) (Bkrtcy.M.D.Ga.1985) 49 B.R. 587, in which the court allowed a filing right after dismissal of a prior case because the [creditor](#) seeking relief in the prior case had obtained all the relief sought in its motion and was therefore not prejudiced by the second filing. The court is aware of a few cases in which other bankruptcy courts have ruled that the court should apply section 109(g)(2) as literally as possible. See, e.g., [In re Denson](#) (Bkrtcy.N.D.Ala. 1986) 56 B.R. 543, and [In re Kenziak](#) (Bkrtcy.W.D.N.C.1985) 46 B.R. 551. To the extent those cases are not factually distinguishable, the court declines to follow them and instead chooses to apply the law as set forth in [Collier](#). The court does not feel that it is ignoring the statutory language, but rather placing a reasonable interpretation on it in the light of the abuses it was intended to eliminate. Applying the [Collier](#) interpretation of the law, it is clear that Roxie obtained the full relief sought in her motions for relief from the stay long before the Chapter 13 was dismissed. Those motions dealt with support payments, and under section 362(b)(2) the filing of the subsequent Chapter 7 did not reimpose a stay as to support proceedings. The dismissal of the Chapter 13 and filing of the Chapter 7 were the result of her attempts to execute on the debtor's property, and had nothing to do with the motions for relief from the stay.

Mootness

It should be noted that the issue is probably quite moot, in that almost 180 days have now elapsed since the Chapter 13 case was dismissed. If the court were to dismiss the case now, the debtor could immediately refile and the only real effect of dismissal would be to interfere with the [Trustee](#)'s administration of the debtor's estate.

Order

The court finds for the reasons set forth above that section 109(g)(2) did not bar the debtor from commencing this case. It is therefore ORDERED that the motion to dismiss is

denied.

Dated: July 10, 1987

ALAN JAROSLOVSKY

U.S. [BANKRUPTCY JUDGE](#) 

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